



Alan C. Lloyd, Ph.D.
Agency Secretary

State Water Resources Control Board

Office of Chief Counsel, Regional Board Legal Services Division

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>



Arnold Schwarzenegger
Governor

File A1719 Deadline:
March 22, 2006

March 22, 2006

VIA EMAIL AND HAND DELIVERY

Ms. Tam M. Doduc, Chair
c/o Ms. Song Her
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



Dear Chair Doduc:

PETITION OF WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA, WATEREUSE ASSOCIATION, AND COUNTY SANITATION DISTRICTS OF LOS ANGELES COUNTY (WASTE DISCHARGE AND WATER RECYCLING REQUIREMENTS FOR ALAMITOS BARRIER RECYCLED WATER PROJECT, ORDER NO. R4-2005-0061), NON-PARTY REGIONAL WATER QUALITY CONTROL BOARD COMMENTS ON DRAFT ORDER DATED FEBRUARY 7, 2006 (SWRCB/OCC FILE A-1719)

Thank you for the opportunity to submit comments on the draft order dated February 7, 2006 (Draft Order), on behalf of the management of the California Regional Water Quality Control Boards that are not parties to this proceeding, with the exception of the Colorado River Basin Regional Water Board (Regional Water Boards). We write separately to emphasize our broader interests in having clear guidance to implement the new policies articulated by the draft order. As explained below, the Regional Water Boards do not support adoption of the draft order as written.

We appreciate that the draft order clearly states that its findings and conclusions are based exclusively on policy considerations. ("In our view, the issue before us is solely a policy issue." Draft Order, p. 3.) Unfortunately, however, the draft order's new policy approach raises many more important questions than it answers. These questions go to issues that are fundamental to the Regional Water Boards' mission: implementing anti-degradation requirements and narrative water quality objectives, writing clear and enforceable permits, and protecting the state's limited water resources for all beneficial uses, all in the difficult policy context of regulating the direct injection of treated wastewater into the state's groundwater aquifers.

Because the draft order does not provide clear guidance to the Regional Water Boards for future wastewater reclamation projects, and because the issues raised by the order are of great importance to many of our stakeholders, we urge you to not adopt the draft order. Rather, we urge you to strongly consider addressing these important issues by updating the almost thirty-year-old "Policy With Respect to Water Reclamation in California" (State Water Board Resolution No. 77-1). This approach would not only allow the public to participate in the development of this important new policy, but it would also provide an opportunity for the State Water Board to fully explore the ramifications of different policy approaches prior to selecting a particular approach. Finally, it would give the State Water Board the opportunity to provide clear guidance to the Regional Water Boards about how to implement the new policy.

Background

This petition seeks the review of waste discharge and water recycling requirements issued by the Los Angeles Regional Water Quality Control Board (Los Angeles Regional Board) for the Alamitos Barrier Recycled Water Project (Project). The Project involves the direct injection of highly treated wastewater into the groundwater aquifer for water supply and prevention of seawater intrusion. The Project's use of treated wastewater for this purpose will conserve a significant amount of potable water that would otherwise have been injected for these purposes. The Los Angeles Regional Board approved the Project. The only issue raised in the petition and addressed by the draft order is whether the Los Angeles Regional Board should have included effluent limitations for certain waste constituents in the waste discharge and water recycling requirements. Those constituents include important emerging pollutants, such as NDMA, perchlorate, and diazinon. The draft order concludes that, as a policy matter, those effluent limitations should not have been included in the waste discharge and water recycling requirements.

Issues Raised by the Draft Order

The draft order acknowledges that it is precedential in nature, but suggests that its precedential effect is intended to be limited to similar types of projects. (Draft Order, fn. 13.) However, the draft order creates several areas of uncertainty that dischargers will likely seize upon to challenge waste discharge requirements for many other types of discharges. But even if the State Water Board intends that the Regional Water Boards follow the draft order only for reclamation projects that involve the substitution of treated wastewater for potable water, the draft order fails to provide sufficient guidance to the Regional Water Boards even for that limited purpose.

The Use of Effluent Limitations as a Regulatory Tool

The draft order deletes the effluent limitations for the Project, even though "it is likely that the effluent limitations will be met." (Draft Order, p. 5.) The draft order does not suggest that these constituents could not be found in the effluent. Nonetheless, the draft order begs the question:

should the Regional Water Boards only use effluent limitations for discharges where there is a "reasonable potential" that the associated water quality objectives will not be complied with? If so, the draft order should clearly state this concept and provide the scientific rationale for its conclusion that there is no reasonable potential that the discharge may cause exceedances of the water quality objectives. Further, in keeping with the reasonable potential approach, the draft order should indicate that the effluent limitations may be reinstated by the Regional Board if, in fact, subsequent monitoring shows that reasonable potential exists for some or all of the constituents. Even if the draft order is based on an implicit "reasonable potential" approach, however, the State Water Board should consider whether the reasonable potential approach is the most effective approach for regulating water quality.

Effluent limitations have the advantage that they are among the clearest and most enforceable types of limitations available to the Regional Water Boards. The dischargers know precisely what is required of them and the public and the Regional Water Boards know whether the dischargers are in compliance with their requirements. Effluent limitations often contrast starkly with receiving water limitations, which can be subject to significant professional disagreement in terms of multiple causes of exceedances, as well as the scope and magnitude of those exceedances based on limiting monitoring data. For these reasons, the Regional Water Boards frequently have to spend substantially more staff hours to follow up on potential exceedances of receiving water limitations than of effluent limitations.

While violations of certain types of effluent limitations can give rise to mandatory minimum penalties or citizen suits, neither is true for the Project's effluent limitations. The Los Angeles Regional Board has complete discretion to not take any enforcement action for violation of the effluent limitations if it finds that no enforcement is warranted, and citizens cannot enforce these requirements. Nonetheless, the draft order relies heavily on the possibility of significant sanctions for determining that the effluent limitations should be deleted, rather than simply providing some direction to the Los Angeles Regional Board about how it should exercise its enforcement discretion if there are violations of the effluent limitations.

The draft order also appears to try to have it both ways. On the one hand, it attempts to provide some reassurance that "the public health is clearly being protected" by the Project (Draft Order, p. 6.) On the other hand, it expresses concerns that the Project will be exposed to "significant" sanctions for violations of the effluent limitations. (Draft Order, p. 5.) Since the effluent limitations are designed to protect the beneficial uses of the groundwater, it is not clear from the draft order how the public health will be clearly protected if there is a significant concern that the Project will be subject to "additional potential liability for violating the limitations." (Draft Order, p. 5.) In addition, the draft order mistakenly suggests that the effluent limitations are "moving target[s]." (Draft Order, p. 5.) This is incorrect. The effluent limitations are simply expressed as concentrations of constituents. The concentrations are not subject to change absent future action by the Los Angeles Regional Board to amend them. In this respect, these effluent

limitations are no different than any other effluent limitations used by the Regional Water Boards.

Finally, and perhaps most importantly, by deleting the effluent limitations for these constituents, the draft order would in fact remove all regulation of these important constituents. The waste discharge and water recycling requirements do not contain receiving water limitations for any of these constituents. Therefore, while the discharger will still be required to monitor for these constituents in its effluent, the draft order provides no guidance about what the Los Angeles Regional Board should do with the monitoring results, especially if they show widespread exceedances of the deleted effluent limitations. Unfortunately, the best reading of the draft order appears to be that the Los Angeles Regional Board is expected to do nothing at all, because any reaction would appear to be at odds with the rationale expressed in the draft order.

Best Available Science

The Los Angeles Regional Board used the best available science for translating its narrative water quality objective that chemical constituents not be present in amounts that adversely affect any designated beneficial uses of the groundwater into effluent limitations. (The draft order at page 7 mistakenly suggests that the relevant water quality objective protects only municipal use of the groundwater. It actually protects all beneficial uses of the groundwater from chemical constituents.) There are a number of different types of scientifically derived concentrations, including Cancer Potency Factors, Reference Doses, odor thresholds, and agricultural use limits that are sometimes used by the Regional Water Boards. These concentrations have not been developed through rulemakings, and various agencies use them for varying purposes. Nonetheless, they often were derived using the best available science, so the Regional Water Boards use them in appropriate cases as necessary to fulfill our legal obligation to implement narrative water quality objectives, protect beneficial uses, and prevent nuisance. In fact, the draft order correctly states that "effluent limitations can be based on criteria that have not been adopted as water quality standards, so long as appropriate findings are made." (Draft Order, pp. 3-4, fn. omitted.)

The draft order, however, puts great weight on the fact that the Department of Health Services uses the same science that the Los Angeles Regional Board used for its effluent limitations to develop its "notification levels" (formerly "action levels"). The notification levels are not adopted through a rulemaking, and are used by the Department of Health Services for a different purpose than the Los Angeles Regional Board used them in this case. It is not at all clear why this makes the science behind the effluent limitations any less dependable than the science behind many other effluent limitations that the Regional Water Boards use to fill the gaps where there are no adopted numeric water quality objectives. If the Regional Water Boards were required to conduct a rulemaking, or wait for another agency to conduct a rulemaking, prior to regulating constituents of concern, especially emerging pollutants, we would frankly be unable to fulfill our mission to protect the beneficial uses of waters of the state.

Finally, the draft order relies upon an email from a staff person at the Department of Health Services for the proposition that the Department of Health Services discouraged the use of the effluent limitations. We understand the State Water Board's direction to defer to other agencies where they have overlapping authority and a greater level of expertise, as in the case of determining the safe level of tap water described in State Water Board WQO 2005-0007 (Olin Corporation). However, the issue addressed by the draft order involves the protection of groundwater resources for all beneficial uses. It is not at all clear that the Department of Health Services has a greater expertise in this, one of the Regional Water Board's primary missions. In addition, we would encourage the State Water Board to obtain policy-level recommendations from the Department of Health Services prior to creating new policy regarding the use of effluent limitations for reclamation projects.

Implementation of Resolution No. 68-16

The draft order cites to policies that encourage the use of treated wastewater, but fails to discuss in equal proportion the policies that support preserving the quality of the state's limited water resources, including State Water Board Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California." Resolution No. 68-16 generally requires the State Water Board and the Regional Water Boards to maintain existing high quality water unless degradation is consistent with the maximum benefit to people of the state, to require best practicable treatment or control of discharges of waste, and to ensure that any authorized degradation does not result in water quality less than that prescribed by state policies, including water quality objectives. The first prong of Resolution No. 68-16 requires a careful balancing of the public's interests, especially in the context of the direct injection of treated wastewater to high quality groundwater aquifers.¹ The fact that these important policies can be in tension with each other in this context strongly suggests the desirability of the State Water Board reconciling them and providing consistent guidance to the Regional Water Boards through development of updated policy.

In addition, the draft order fails to explain how, in the absence of any limitations whatsoever on the amounts of these constituents that can be discharged by the Project, the draft order is implementing Resolution No. 68-16 for the Project. First, does the draft order assume that the advanced treatment train constitutes best practicable treatment or control, as required by Resolution No. 68-16? If so, this suggests that the Regional Water Boards should require similar treatment for all similar projects. Second, the draft order does not explain how it ensures that the Los Angeles Regional Water Quality Control Plan's water quality objective will be complied with in the absence of the effluent limitations. The draft order contains only a conclusory statement that "we do not agree that concentrations of chemicals above notification levels will violate the water quality objective that requires that there be no chemical constituents in amounts

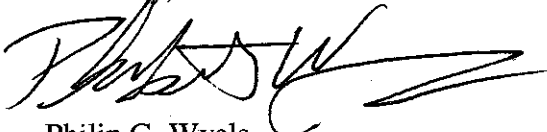
¹ Note that some of the same difficult balancing issues arise in the context of aquifer storage and recovery projects, especially in the case of persistent constituents of concern.

that adversely affect municipal use of the ground waters." (Draft Order, pp. 6-7.) But if the State Water Board believes that the concentrations used as effluent limitations by the Los Angeles Regional Board are more stringent than necessary to comply with the water quality objective, then the draft order should identify the correct concentrations and impose them, at least as receiving water limitations, if not effluent limitations. Otherwise, it appears that the draft order fails to properly implement Resolution No. 68-16, and, in so doing, fails to provide clear guidance for the Regional Water Boards.

Conclusion

Thank you for the opportunity to submit comments on these important issues. We hope that they are helpful in identifying areas where the draft order will result in inadvertent confusion and a lack of clear guidance for the Regional Water Boards. In addition, while the policies encouraging the use of treated wastewater for reuse are obviously important to the people of the state, so too are the policies regarding the protection of the state's existing limited water resources. The reconciliation of these policies requires a careful and thoughtful balancing of potentially competing interests. Therefore, the Regional Water Boards urge the State Board to strongly consider balancing these policies and addressing the issues raised in the draft order through the State Water Board's open, collaborative process for adopting state water quality control policy, rather than this draft order.

Sincerely,



Philip G. Wyels
Assistant Chief Counsel
Regional Board Legal Services Division

cc: Regional Water Board Executive
Officers (via email)